Supreme Court, U.S.
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NO. 89-1216

In the Supreme Court of the United States

OCTOBER TERM, 1989

PORT SHIP SERVICE, INC.
Petitioner,

versus

NORTON LILLY & COMPANY, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Respondent Norton Lilly International, Inc. In Opposition

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QUESTION PRESENTED

Whether this Court should review the factual findings of the trial court, affirmed by the Fifth Circuit Court of Appeals, that the identity of respondent's principals had been disclosed sufficiently, thus precluding recovery against respondent for its principals' debts.

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STATEMENT OF THE CASE

The trial court found, and the United States Court of Appeals for the Fifth Circuit agreed, that respondent, Norton Lilly International, Inc. (formerly Norton Lilly & Company, Inc.) ("Norton Lilly"), was an agent for sufficiently disclosed principals and therefore, not liable for its principals' debts. Consequently, petitioner, Port Ship Service, Inc. ("Port Ship"), was denied recovery of approximately $26,000[1] in unpaid invoices for water taxi services provided to vessels for which respondent acted as agent.

Norton Lilly is a husbanding agent for vessel owners and occasionally for charterers. Port Ship provides water taxi services to vessels for which Norton Lilly acts as agent in the Port of New Orleans. Port Ship regularly solicits business directly from Norton Lilly's principals and from the masters of vessels for which respondent acts as agent. In fact, Port Ship frequently provides services to vessels without Norton Lilly's knowledge and most of the unpaid invoices at issue were neither ordered nor authorized by Norton Lilly, but were ordered by third parties, such as pilots, crew members, surveyors, port captains, ship chandlers, repairmen and representatives of government agencies.

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[1]Port Ship's demand includes $21,692.50 for services rendered more than three years before suit was filed. Thus, most of the unpaid invoices sued upon are prescribed by State statute, La. Rev. Stat. 9:2781, Open Accounts, and/or the admiralty doctrine of laches.

Port Ship also maintains a board at its various facilities showing which agent represents the owner, the charterer, the shipper, or the time charterer of each vessel serviced. Moreover, Norton Lilly is available twenty-four hours a day to provide information regarding its principals. Finally, Port Ship has provided water taxi services in the Port of New Orleans for over fifty years, and during that time it was aware of and until 1985 observed a local port custom, that, even in those instances where the agent orders the water taxi services, payment is sought only from the principal, rather than the agent.

SUMMARY OF ARGUMENT

The facts as found by the District Court and affirmed by the Fifth Circuit are fully supported by the record and the law applied is consistent with the decisions of the Court of Appeals for the Second Circuit. Accordingly, the Supreme Court should not exercise its discretionary jurisdiction to review this case.

ARGUMENT

I. The Trial Court's Findings Of Fact Are Fully Supported By The Record

The Supreme Court does not grant certiorari to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). In this case, the United States Court of Appeals for the Fifth Circuit concluded that the findings of the trial court

were correct and affirmed the lower court's judgment. The findings made by the District Court are based upon the proper assessment of the credibility of witnesses and documentary evidence and are fully supported by the record.

II. The Fifth Circuit's Decision Is Not In Conflict With That Of The Second Circuit

Although petitioner argued to the trial court and the appellate court, both of which agreed, that the rule of law articulated in *Port Ship Service, Inc. v. International Ship Management*, 800 F.2d 1418 (5th Cir. 1986) controlled, petitioner failed to even mention the case in its Petition for Writ of Certiorari.

> The *Restatement* makes it clear that it is the agent's duty to disclose the principal's identity, not the third parties' duty to ascertain the identity. *Orient Mid-East Lines v. Albert E. Bowan, Inc.*, 458 F.2d 572 (2d Cir. 1972). A third party, such as Port Ship, however, need only receive *notice* of the identity of the principal, which may come from any source. *Restatement* at §4, Comment (d). Furthermore, the identity of the principal can be sufficiently disclosed even when the third party has no actual knowledge of it; "the [third party] has notice of the existence or identity of the

principal if he knows, has reason to know, or should know of it, or has been given a notification of the fact." *Lubbock Feed Lots, Inc. v. Iowa Feed Processors,* 630 F.2d 250, 275-76 (5th Cir. 1980) (quoting *Restatement* at Section 4 (2), Comment (a)). *Port Ship Service, Inc. v. International Ship Management, Inc., supra,* at 1421 (emphasis in the original).

The trial court found that Norton Lilly had discharged its burden of disclosing its principals' identities "by giving Port Ship sufficient information so that Port Ship knew, or should have known, or had reason to know, through any other source, the principal's identity." There is no requirement that the principals' names be disclosed; rather the law requires that sufficient notice of a principal's identity be available. *Unger v. Travel Arrangements, Inc.,* 25 A.D.2d 40, 266 N.Y.S. 715 (1st Dept. 1966). Thus, the trial court correctly applied the principles of law set out in the *Restatement* and the Fifth Circuit's prior decision to the facts of the instant case.

This rule is also consistent with Second Circuit jurisprudence. *See Hudson Trading Co. v. Hasler & Co., Inc.,* 11 F.2d 666, 667 (S.D. N.Y. 1926); *Instituto Cubano de Estabilizacion del Azucar v. The S/S Theotokos,* 155 F.Supp. 945, 946-47 (S.D. N.Y. 1957); *Golten Marine Co. v. World Tide Shipping Corp.,* 1975 A.M.C. 160, 161 (Civ. Ct. N.Y. 1974); *See also*

2 Williston, Contracts, § 288 (3d ed. 1959); *Chartwell Shipping, Ltd. v. Q.N.S. Paper Co.*, 1989 A.M.C. 2798, 2844 (Sup. Ct. Canada 1989); *Valkenburg v. The S.S. Henry Denny*, 295 F.2d 330 (7th Cir. 1961).

The case of *Orient Mid-East Lines v. Albert E. Bowan, Inc.*, 458 F.2d 572 (2d Cir. 1972), cited by Port Ship as being inconsistent, is inapplicable in light of the trial court's findings. In *Orient*, there was no evidence that the plaintiff knew or had reason to know the identity of the agent's principal, or that it had ever directly solicited business from the principal. Nor was there evidence of a local port custom. Nevertheless, the *Orient* court specifically noted that a principal's identity is disclosed in situations where a creditor has sufficient information such that it is able, or should be able to distinguish the principal, and it is customary for only the principal to be liable. Id. at 576 fn. 5, 577. Consequently, when a principal is sufficiently disclosed, the agent does not become a party to the contract and is not liable thereon. Restatement (Second) of Agency, §320. As held by the Fifth Circuit, the sources available to Port Ship, "taken as a whole, provide[d] sufficient notice to relieve Norton Lilly of liability... ." *Port Ship Service, Inc. v. Norton Lilly & Company, Inc.*, 883 F.2d 23, 25 (5th Cir. 1989).

CONCLUSION

Port Ship's Petition for Writ of Certiorari should be denied. The trial court's findings of fact are correct, and there is no conflict between the circuits.

Respectfully submitted:

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